No. 06-1330

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In The
Supreme Court of the United States

SANTA BARBARA BANK & TRUST, *et al.*,

Petitioners,

v.

CANIEVA HOOD and
CONGRESS OF CALIFORNIA SENIORS,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 15.6 of this Court, Petitioners hereby submit this Reply Brief in support of their Petition for Writ of Certiorari (the "Petition").[1]

A. JURISDICTION IS PROPER UNDER *COX BROADCASTING* AND 28 U.S.C. § 2106.

Plaintiffs/Respondents first oppose certiorari on the ground that the Court of Appeal's decision is not "final." However, this case easily satisfies the finality standard under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The Court of Appeal has issued a conclusive ruling on dispositive questions of federal law, the ruling is contrary to intervening authority from this Court and failure to grant certiorari will seriously erode federal policy.

The Superior Court entered a final judgment, which was set aside by the Court of Appeal through misapplication of federal law. The Court of Appeal expressly refused to apply federal precedents that are now known, by reason of the opinion in *Watters v. Wachovia*, 127 S. Ct. 1559 (2007), to be correct statements of the law.[2] Now, "immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice, as well as precipitate interference with state litigation." *Cox Broadcasting*, 420 U.S. at 477-78 (internal quotation and citation omitted); *see also Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 388 n.4 (1964) (because of significance of federal issues, certiorari was appropriate in spite of the possibility of future proceedings). At a minimum, this Court should grant certiorari, vacate the

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[1] Petitioners' corporate disclosure statement is set forth at pages iii-iv of the Petition.

[2] In addition to *Watters* itself, Petitioners also presented *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *cert. denied* (Apr. 23, 2007), and *National City Bank v. Turnbaugh*, 463 F.3d 325 (4th Cir. 2006), *cert. denied* (Apr. 23, 2007), in the briefing below.

decision of the Court of Appeal and direct it to reconsider its prior ruling in light of *Watters*. *See* 28 U.S.C. § 2106; *Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (emphasizing importance of "GVR" orders to ensure uniformity of federal law); *Stutson v. United States*, 516 U.S. 163, 177, 180 (1996) (discussing power to issue GVR order to State court so that "intervening event" of recent ruling may be considered) (Scalia, J., dissenting). Certiorari is essential here "to secure uniformity of decision." *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Reinstatement of the Superior Court's judgment would terminate the litigation, protect the important federal policy at issue here, and prevent confusion over the scope of National Bank Act preemption in future California cases. Thus, the instant case differs vastly from *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), upon which Plaintiffs rely. *Jefferson* originally came to the Alabama Supreme Court on an interlocutory appeal. *Id.* at 77, 81. Here, by contrast, the Superior Court's judgment was final, and the issue on appeal was whether the judgment should be affirmed. If the federal questions are resolved in favor of Petitioners, the outcome will be to reinstate the original final judgment. In other words, "reversal of the state court [of appeal] on the federal issue would be preclusive of any further litigation." *Cox Broadcasting*, 420 U.S. at 482-83.

The Court of Appeal has rendered important final conclusions of federal law, including by barring the banks from reasserting the visitorial powers defense at any future stage of the proceedings. As a key purpose of National Bank Act preemption is to shield federally-chartered lenders from undue interference by States, the banks' federal rights are violated now and will be violated continuously if they must litigate further before obtaining review here. In this sense the Court of Appeal's judgment is "final" as well. *See Abney v. United States*, 431 U.S. 651, 659-60 (1977).

This Court also recognizes the importance of its certiorari jurisdiction to review State-court decisions that, if left unaddressed, threaten to "seriously erode federal policy." *See Cox Broadcasting*, 420 U.S. at 482-83. Here the Court of Appeal expressly (and erroneously) declined to follow numerous federal precedents, and its conclusion directly conflicts with this Court's subsequent decision in *Watters*. This Court has previously recognized that the federal interest in the national banking system is so substantial that in *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963), certiorari jurisdiction was exercised over a venue question, notwithstanding the "preliminary" nature of the issue and the possibility that the petitioner ultimately might prevail on a merits issue. Certiorari was granted to protect the national bank from "long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." *Id.*

So too here, the banks face extended litigation in State court if the preemption question is not resolved in their favor, with their judgment reinstated. "That the petitioner who protests against the state court's decision on the federal question might prevail on the merits on nonfederal grounds in the course of further proceedings anticipated in the state court and hence obviate later review of the federal issue here is not preclusive of our jurisdiction." *Cox*, 420 U.S. at 487 n.13. This Court has jurisdiction, and certiorari should be granted.

B. THE FEDERAL INTEREST IN NATIONAL BANKING IS SUBSTANTIAL AND REQUIRES THIS COURT'S PROTECTION.

Given the undisputed character of the federal interest, numerous reasons exist to grant certiorari, as set forth in the Petition. This Court should reject Plaintiffs' efforts to recharacterize the Court of Appeal's decision as merely involving regulatory interpretation, rather than as involving incorrect application of a legal presumption in violation of the established precedent of this Court. The Court

of Appeal weighed too lightly the important federal interest in uniform operation of the national banking system. That is fundamentally how the Court of Appeal erred, and is fundamentally why certiorari is appropriate.

The Court of Appeal's application of an erroneous presumption against preemption colored its analysis of the OCC's regulations, necessitating review here. More significantly, as this Court recognized in *Watters*, preemption flows from the National Bank Act itself, and is not dependent upon the OCC's regulations. *See Watters*, 127 S. Ct. at 1567; *see also Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 32-34 (1996). In *Watters*, this Court confirmed uniform views of the federal Circuit Courts that no presumption against preemption applies in the context of national banking. *Id.*, 127 S. Ct. at 1566-67. Plaintiffs concede that the Court of Appeal indeed applied a presumption against preemption. [Opp. 14-15.] Plaintiffs also concede, as they must, that the Court of Appeal only gave the OCC "limited deference." [Opp. 20.] That "limited deference," coupled with the incorrect view that a presumption against preemption applies, led the Court of Appeal to read the OCC's regulations narrowly, and to stretch to avoid preemption however possible. This also was error, and the two errors together reach Constitutional significance because they reflect an approach in California that undermines this Court's efforts to set forth uniform principles of preemption analysis.

Federally-regulated industries, like national banking, exist in a condition of "somewhat delicate balance of statutory objectives." *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (State-law claim preempted to maintain careful balance between competing interests in safety and medical innovation). The OCC is charged with overseeing the balance between consumer protection, on the one hand, and bank safety and soundness on the other. It violates the federal interest to let State-court litigation invade the OCC's prerogative to oversee and adjust that balance as the public interest may dictate. *See Watters*, 127 S. Ct. at 1564 ("OCC oversees the

operations of national banks *and their interactions with customers*") (emphasis supplied).

The Court of Appeal, however, wrongly suggested that preemption occurs only upon an affirmative showing of a "clear indication that the OCC condones" the specific challenged activity. [Pet. App. 29a.] Given the extensive history of federal activity in this area, the Court of Appeal imposed too strict a standard on the banks, and therefore erred. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 884 (2000) (no "express statement of pre-emptive intent" is required). In *Fidelity Federal Savings & Loan Association v. De La Cuesta*, 458 U.S. 141, 146 (1982), this Court concluded that the Supremacy Clause is violated by adopting a narrow reading of the intent to preempt, yet that is exactly what the Court of Appeal did here. It used a narrow canon of construction to evade the federal purpose, despite this Court's teaching that regulations should be read in a manner designed to achieve their overarching policies. *See City of New York v. FCC*, 486 U.S. 57, 64 (1988).

The OCC has determined that the need for national uniformity in national banks' loan applications and other documents dictates that national banks must be exempt from "state law limitations concerning ... disclosure and advertising, including laws requiring specific statements, information or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents." 12 C.F.R. § 7.4008(d)(2)(viii). The OCC's regulation follows long-established authority of this Court recognizing that States may not impose special disclosure or advertising rules on national banks. *See Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377-79 (1954) (State truth-in-advertising statute held preempted as to national bank savings accounts). Plaintiffs nonetheless sue on the theory that the term in the Santa Barbara loan application, wherein Ms. Hood authorized repayment of the prior debt as a condition of requesting a new tax refund anticipation loan ("RAL"), was not properly disclosed to her as a matter of California law, and that even if the repayment condition

had been properly disclosed, it is "unfair" as a matter of California law.[3] Consideration of the disclosure claims by a California state court plainly violates the OCC's mandate.

Similarly, Plaintiffs' "unfairness" challenge under State law ignores the context in which the cross-collection arrangements reside. Banks enter into cross-collection agreements so that each bank is protected against the risk of accumulating losses on RAL lending operations. The national bank agreements under attack here make it possible for each bank to lend more safely and at lower cost, and thus the agreements are subject to the protection of 12 C.F.R. § 7.4008(d)(2)(ii), allowing "risk mitigants." Moreover, because the repayment condition required under the cross-collection agreement is implemented through express provisions in the written loan applications [*see* Pet. App. 101a-102a] it also is a "term of credit" protected from State-law challenge under 12 C.F.R. § 7.4008(d)(2)(iv). *See also Fidelity Federal v. De La Cuesta*, 458 U.S. at 146 (States may not regulate the terms of federally-chartered lenders' loan agreements).

To recharacterize the issue here as whether regulation of "debt collection" falls within traditional State police powers, as Plaintiffs suggest, improperly avoids the fundamental

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[3] No federal claims or liability theories are alleged in the complaint. The Court of Appeal's statements [*see* Pet App. 22a, 25a] that Plaintiffs might pursue State-law remedies to enforce some unspecified duties under the Fair Debt Collection Practices Act or other federal laws lack all record support. Opposing certiorari, Plaintiffs suggest only that they someday might wish to pursue such theories. Even so, to allow State-law remedies to be tacked onto federal liability theories would itself implicate serious preemption concerns. "It is not always a sufficient answer to a claim of pre-emption to say that state rules supplement, or even mirror, federal requirements." *United States v. Locke*, 529 U.S. 89, 115 (2000). "The appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation." *Id.*; *see also Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) ("a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go").

question under the Supremacy Clause, the National Bank Act and this Court's precedents: Is the federal interest in the national banking system impaired by allowing the claims in this litigation to proceed, given the nature of RAL lending activity? *See Easton v. Iowa*, 188 U.S. 220, 229 (1903) (State statute not saved from preemption merely because it was a statute of general application intended to prevent fraud). The National Bank Act's goal is to establish "a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." *Id.*[4]

Plaintiffs cannot dispute that longstanding guidance from the OCC contemplates that reciprocal collection arrangements are within national banks' powers:

> [I]t is both usual and necessary for banks to undertake collection activities with respect to their own delinquent loans. Thus, it is permissible for national banks to collect delinquent loans on others' behalf.

OCC Interpretive Letter, 1985 WL 151323 (Aug. 27, 1985).

By allowing national banks to better control and predict their delinquency risk, and thereby reduce the cost of lending, cross-collection benefits the nationwide populations of non-delinquent RAL borrowers and national bank depositors. The cross-collection arrangements at issue in

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[4] Plaintiffs' authorities do not challenge this principle. *Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997), for example, involved whether the federal Resolution Trust Corporation could pursue State-law theories when seeking to hold directors of a failed federal thrift responsible for breaches of fiduciary duties toward the thrift. It was appropriate in *Atherton* for the agency to look to State law for basic legal infrastructure setting forth duties of corporate directors, particularly when applying such law served the federal interest in mustering the assets of an insolvent thrift for the benefit of its depositors. Here, to apply State law would impair the assets of the national bank, and thus impair the interests of its depositors (and of the federal government, which insures a significant portion of those deposits).

this litigation, then, tie both to the lending power and the power under 12 U.S.C. § 24 (Seventh) to exercise "all such incidental powers as shall be necessary to carry on the business of banking." In the national banking context, "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Barnett*, 517 U.S. at 34; *accord Watters*, 127 S. Ct. at 1567; *see also First Nat'l Bank v. California*, 262 U.S. 366, 368-69 (1923); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896); *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875). If courts in every State can make their own unguided determinations that particular national banking practices may be enjoined as "unfair," the federal interest in uniform treatment of national banks, under OCC supervision, will be impaired immeasurably. *See Geier*, 529 U.S. at 885 (Court should not "tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended").

The Court of Appeal's analytical method conflicts with this Court's decisions under the National Bank Act. As a result, a key component of a federal lending program now faces a severe threat. Certiorari should therefore be granted.

C. THE VISITORIAL POWERS QUESTION IS SQUARELY PRESENTED AND SHOULD BE DECIDED.

Plaintiffs seek to displace the OCC in favor of a State court injunction. As explained in the Petition, the Superior Court and the dissenting appellate justice correctly determined that Plaintiffs' pursuit of class and private attorney general claims is "visitorial" in character, in that pursuit of the claims would improperly interfere with the OCC's exclusive regulatory and enforcement powers. Plaintiffs do not seriously dispute that their aim is to regulate the banks by prohibiting their cross-collection arrangements.

Instead, Plaintiffs rely wholly on the Court of Appeal's conclusion that in civil litigation commenced by non-governmental plaintiffs, there is a *per se* bar on consideration of the visitorial powers defense. [*See* Pet. App. 17a-20a.] This is far too narrow a reading of the visitorial powers doctrine. It is immaterial that the attempt to regulate the banks comes in the form of private attorney general or class action litigation, rather than in a formal State regulatory proceeding. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 126 S. Ct. 1503, 1510-11 (2006) (pendency of a class action lawsuit may frustrate or delay normal business activity in violation of Congressional policy); *Buckman*, 531 U.S. at 353 (where "litigation would exert an extraneous pull on the scheme established by Congress, [] it is therefore pre-empted by that scheme").

No circuit split existed when certiorari was granted in *Watters*, yet this Court deemed the issue significant enough to merit review. *See also Ballard v. Commissioner*, 544 U.S. 40 (2005) (granting certiorari despite lack of a Circuit split, but where one appellate judge had dissented). As explained in the Petition, a split exists here between federal and state authorities, principally at the trial court level. Heightening the significance of the split, however, is that the federal district courts sitting in California do *not* apply the Court of Appeal's *per se* bar on considering the visitorial powers doctrine outside the context of formal action by State officials. Whether the visitorial powers doctrine ever may be invoked in private-party litigation is squarely presented here. The issue is a critically important one, meriting this Court's certiorari review.

CONCLUSION

For the reasons set forth above, and set forth in the Petition and their Supplemental Brief, Petitioners respectfully request that this Court grant the Petition, issue a writ of certiorari, and reverse or vacate the judgment of the California Court of Appeal.

Respectfully submitted,

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